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Supreme Court of the United States

OCTOBER TERM, 1979

NO. 78-1088

PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY,
Petitioner,

v.

LOUISE E. SPENCE (widow of James T. Spence) and TERMINAL SHIPPING COMPANY and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

RESPONDENT, TERMINAL SHIPPING COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SAMUEL KIMMEL
A. OWEN HENNEGAN
Moore, Hennegan, Carney & Ryan
406 Jefferson Building
Towson, Maryland 21204

Attorneys for Respondent, Terminal Shipping Company

THE PAUL M. HARROD COMPANY, BALTIMORE, MARYLAND 21234

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RESPONDENT, TERMINAL SHIPPING COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

This brief is filed on behalf of the Respondent, Terminal Shipping Company, in opposition to Pennsylvania National Mutual Casualty Insuance Company's petition that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit entered

in this proceeding on January 25, 1979; the petition for rehearing and the suggestion for rehearing en banc having been denied by Order dated May 3, 1979.

QUESTIONS PRESENTED

1. Whether Pennsylvania National, which was the compensation insurance carrier at the time of employment-related injury, is relieved of the liability for death benefits which are payable to the claimant-widow by reason of the 1972 Amendments to Longshoremen's Act solely on the ground that the compensation policy terminated prior to the decedent's death.

2. Pennsylvania National is barred from denying its compensation liability where it failed to timely advise the employer that it would deny insurance coverage to the employer and proceeded to participate in litigating this claim.

3. Does the requirement of the 1972 Amendments to the Longshoremen's Act in expanding the death benefit create an unnecessary and unreasonable burden upon the claimant seeking such benefits?

STATUTES INVOLVED

The Respondent agrees that those statutes cited in the petition of Pennsylvania National Mutual Casualty Company are the pertinent statutes involved, as well as the following statutes:

(1) 33 USC §932 (a)(1) Security for Compensation:

> "(a) Every employer shall secure the payment of compensation under this Act [§§901 and note-921, 922-945, 947-950 of this title] - - (1) By insuring and keeping insured the payment of such compensation with any stock company or mutual company or association, or with any other person or fund, while such person or fund is authorized (A) under the laws of the United States or of any State, to insure workmen's compensation, and (B) by the commission [Secretary of Labor], to insure payment of compensation under this Act [§§901 and note-921, 922-945, 947-950 of this title]; or"

(2) 33 USC §932 (a) (2):

> "(2) By furnishing satisfactory proof to the commission [Secretary] of his financial ability to pay such compensation and receiving an authorization from the commission [Secretary] to pay such compensation directly. The Commission [Secretary] may, as a condition to such authorization, require such employer to deposit in a depository designated by the commission [Secretary] either an indemnity bond or securities (at the option of the employer) of a kind and in an amount determined by the commission [Secretary], and subject to such conditions as the commission [Secretary] may prescribe, which shall include authorization to the commission [Secretary] in case of default to sell

any such securities sufficient to pay compensation awards or to bring suit upon such bonds, to procure prompt payment of compensation under this Act [§§901 and note-921, 922-945, 947-950 of this title]. Any employer securing compensation in accordance with the provisions of this paragraph shall be known as a self-insurer."

RESPONDENT'S STATEMENT OF FACTS

James T. Spence was employed as a longshoreman by Terminal Shipping Company. On March 24, 1967, he sustained an employment-related injury, while on a vessel in navigable waters, which was compensable pursuant to the Longshoreman's Act. It was formally decided on January 9, 1973, that the injury caused a permanent total disability. This disability continued to exist until Mr. Spence's death on November 11, 1973. It was stipulated in the case that death was from causes unrelated to the employment injury and that Louise E. Spence is the widow of the decedent within the meaning of the Act.

On the day of the decedent's injury, the employer had secured workers' compensation insurance, as required by the Act,[1] with Pennsylvania National. This policy terminated on or about February 1, 1971. Moreover, on January 1, 1970, Terminal Shipping Company was acquired by Atlantic and Gulf Stevedores and through Atlantic and Gulf if became a self-insured employer after the termination of Pennsylvania National's insurance policy.

[1] See, 33 U.S.C., Section 932 (a) (1)

Between the date of the employment-related injury and Mr. Spence's death, an amendment to the Act's death benefits provision was enacted whereby death benefits were made payable to qualified survivors of an employee who sustained a compensable injury which resulted in permanent total disability regardless of the actual cause of death.

Pennsylvania National, as carrier and on behalf of the employer, was advised of Mr. Spence's death at least by December 31, 1973. And, by letter dated January 17, 1974, a formal claim for death benefits was filed with the appropriate deputy commissioner on behalf of Louise E. Spence. On May 24, 1974, an informal conference was held. A letter by the claims examiner was sent to all parties on June 6, 1974, in which he summarized the areas of agreement and the remaining issues in dispute. Therefore, a referral for a formal hearing was sent to the Office of the Chief Administrative Law Judge which included the outstanding issues in dispute.[2]

[2] The decedent was held to have been permanently totally disabled by an order of the deputy commissioner which was issued on January 9, 1973. However, as a part of the 1972 Amendments to the Act, all adjudicatory powers previously vested in the deputy commissioners were tranferred to administrative law judges. Hence, the administrative law judge concluded that the deputy commissioner lacked the authority to issue the disability order and he further held that its subsequent affirmance by the Benefits Review Board did not cure that jurisdictional defect.
Accord, Barthelemy v. J. Ray McDermott & Co., 537 F.2d 168 (5th Cir. 1976).

ARGUMENT

I.

PENNSYLVANIA NATIONAL IS JOINTLY AND SEVERALLY LIABLE WITH THE EMPLOYER FOR THE PAYMENT OF DEATH BENEFITS TO THE CLAIMANT-WIDOW BECAUSE IT WAS THE COMPENSATION INSURANCE CARRIER AT THE TIME OF THE EMPLOYMENT INJURY WHICH IS THE DATE WHEN THE ACT'S JURISDICTION ATTACHED.

The question before the Court does not involve the right of the claimant-widow to death benefits. As Pennylvania National concedes, (Pet. Br. at 5), the applicability of amended Section 9 in a case factually similar to the instant one, as well as the constitutionality of that provision, was affirmatively resolved by this Court in *Norfolk, Baltimore & Carolina Lines, Inc. v. Director, Office of Workers' Compensation Programs*, 539 F.2d 378 (4th Cir. 1976), cert. denied, 429 U.S. 1078 (1977). *Accord, State Insurance Fund v. Pesce*, 548 F.2d 1112 (2nd Cir. 1977); *Nacirema Operating Co. v. Lynn*, 577 F.2d 852, (3rd Cir., June 5, 1978). At issue herein is the limited question of liability for the death benefits as between the employer and an insurance company.

There has never been any dispute that the employer secured compensation insurance with Pennsylvania National and this policy was in effect at the time of Mr. Spence's employment injury in 1967, which caused the permanent total disability. Similarly, it is undisputed that this policy terminated in 1971, prior to his death. However, the termination of a policy of insurance does not relieve Pennsylvania National of liability for this compensable death.

The right to death benefits has long been recognized as a right which does not come into existence until death occurs. See, e.g., *Hampton Roads Stevedoring Corp. v. O'Hearne*, 184 F.2d 76 (4th Cir. 1950). However, this separate right to claim benefits does not alter or affect the relationship and obligation of a carrier to an employer. It does not matter if a compensable death occurs after the termination of the insurance policy. For example, had the 1972 Amendments simply increased the amount of the weekly death benefits and had the claim herein been based upon a finding of a causal relationship between the 1973 death and the 1967 injury, there would have been no question that Pennsylvania National was liable and liable for the increased rate in death benefits. See, *O'Hearne, supra*. Of course, the 1972 Amendment to Section 9 did expand the conditions for entitlement but that amendment is not significantly different. The 1972 Amendment did not create any new right. The Court of Appeals recognized in *Norfolk, Baltimore & Carolina Lines, Inc. v. Director, Office of Workers' Compensation Programs*, 539 F.2d 378, 380-81 (4th Cir. 1976):

> Death benefits were included in the Act before the 1972 amendment, so that it did not introduce a novel or radical concept. This court has unequivocally insisted that they may constitutionally be increased after the injury and before death. *Hampton Roads Stevedoring Corp. v. O'Hearne, supra*, 184 F.2d 76, 78 (4th Cir. 1950). That is precisely the immediate situation; the 1972 amendment enlarged those benefits in that interval.

Moreover, the right to claim death benefits herein, while it did not come into being until the event of death, still has as its source, as in all death claims, a compensable injury. And, it was this compensable permanently totally disabling injury of 1967 which is the basis upon which Congress' legislative authority initially attached and is the basis for Congress' continued authority to regulate the substantive rights of the parties. See, *Crowell v. Benson*, 285 U.S. 22, 41-42 (1932); *Norfolk, Baltimore & Carolina Lines, Inc., supra.* 539 F.2d at 380. In fact, death benefits are not payable to the claimant-widow solely because of Spence's death, rather, because at death he was permanently totally disabled as a result of the compensable injury.

The employer's primary liability for the death benefits, then, is predicated upon both the event of death and the employment injury. The fact that when the second and final event occurred that Pennsylvania National's policy had terminated does not relieve it of the liability which it insured against and which is predicated upon the employment injury.

The Longshoremen's Act provides that each employer shall secure the payment of all compensation payable under the Act; see 33 U.S.C. Section 904; and this specifically includes the payment of death benefits authorized by Section 9, 33 U.S.C. Section 909. This statutory obligation may be satisfied by either becoming an authorized self-insured employer, or, by securing a policy of compensation insurance. See 33 U.S.C. Section 932 (a) (1) and 33 U.S.C. Section 932 (a) (2). Thus, while the Act imposes primary liability upon an employer to pay all compensable claims, the employer may discharge its responsibility by securing insurance with a firm authorized to issue compensation insurance under the Act.

Moreover, the Act further provides that the carrier stands in the shoes of the employer. For example, an employer's knowledge or notice of injury is knowledge or notice to the carrier and any decision or order is binding upon the carrier to the same extent that it binds the employer. See 33 U.S.C. Section 935 (Supp. V, 1975). Hence, a compensation insurance carrier is required by the Act to discharge an employer's liability for all of the benefits payable or which are predicated upon the employment-related injury. The fact that the carrier did not fully anticipate the extent of the liability, including subsequent amendments when it entered into the contract of insurance, is not a defense. Indeed, such an assertion by an employer and its carrier has been rejected in the case of *O'Hearne, supra., and Norfolk, Baltimore & Carolina Lines, Inc., supra.*

II.

PENNSYLVANIA NATIONAL IS BARRED TO DENY COMPENSATION LIABILITY FOR THE EMPLOYER AFTER IT FAILED TO GIVE TIMELY NOTICE THAT IT WOULD ASSERT A DEFENSE IN CONFLICT WITH THE INTERESTS OF THE EMPLOYER WHILE IT ALSO RETAINED CONTROL OF THE LITIGATION AND IN FACT ENTERED INTO STIPULATIONS WHICH BIND THE EMPLOYER AND UPON WHICH IT NOW RELIES TO IMPOSE SOLE LIABILITY ON THE EMPLOYER.

Pennsylvania National, on its own behalf and on behalf of the employer, participated in formal hearings which resulted in an order of the deputy commissioner on January 9, 1973,

wherein he determined that James Spence was permanently totally disabled. Pennsylvania National appealed to the Benefits Review Board but the Board affirmed the award on August 20, 1973. Thereafter, disability compensation was continuously paid to Spence until his death when Pennsylvania National notified the deputy commissioner that it was terminating benefits.

Pennsylvania National gave no notice to the employer (actually, the employer's successor) or anyone else that it did not consider itself to stand in the employer's shoes for all purposes in this case, until after it had stipulated that the deceased worker was permanently totally disabled and that the death was not related to the injury.[1] Pennsylvania National has admitted that the carrier on the risk at the time of injury would remain liable for a causally-*related* death, and would even be liable in full for a statutory increase in the benefits for such a death, despite enactment of the increase and occurrence of the death after the policy had expired. Pennsylvania National's stipulation that the worker's death was not causally related to his employment injury, at a time when it purported to represent Terminal Shipping's interests without distinction from its own, certainly should estop it from assuming its present posture, that Terminal Shipping is liable but it is not.

[1] In fact, Pennsylvania National's attorney purported to represent the employer as well as its former insurer from the time of death (November, 1973) through administrative proceedings in which it agreed to these facts, until January, 1976, when, in responding to Respondent Spence's motion to dismiss review proceedings in the Court of Appeals for want of a "final order of the Board" or otherwise to remand the case for entry of an order for payment, Pennsylvania National first raised its contention that it was not responsible for Terminal Shipping's liability.

Petitioner argues that the death benefit is a new and distinct cause of action from the injury benefit, and, therefore, the cause of action for the death benefit arises at the time of death. But the Court of Appeals for the Fourth Circuit properly dealt with this contention in its opinion where it said:

> "Those issues were examined and decided adversely to the petitioner's contention in *N., B. & C. Lines v. Director, Office of W.C.P., supra*, at 380-381 (539 F.2d). In that decision, it was pointed out (1) that death benefits were allowable under the Act long prior to the 1972 Amendments and (2) that such benefits could be validly increased by Congress after the injury and before death. *Hampton Roads Stevedoring Corp., supra* (184 F.2d at 78) the very authority on which the petitioner pins its argument, had decided that almost thirty years ago. Nor can the action of Congress in increasing such benefits by the 1972 Amendments be assailed on constitutional grounds or on grounds of fairness because 'the employer and the insurer have believed they had contractual rights in the limitation of benefits called for by the Act when, prior to 1972, they assumed these obligations.'[1] (Italics added) Any claim of unfairness in holding an insurance carrier liable years afterwards for death benefits based on a finding of injury during the period of the carrier's policy is no more appealing than would be the claim of the employer to be relieved of a liability that only becomes compensable years after the employee has left its employment."

[1] 539 F.2d at 381.

III.

DOES THE REQUIREMENT OF THE 1972 AMENDMENTS TO THE LONGSHOREMEN'S ACT IN EXPANDING THE DEATH BENEFIT CREATE AN UNNECESSARY AND UNREASONABLE BURDEN UPON THE CLAIMANT SEEKING SUCH BENEFITS?

Pennsylvania National raises this issue for the first time at this level of the proceedings. It infers that imposition of liability on an insurer which no longer has a policy in force for the employer (and in fact no longer writes Longshoremen's Act insurance at all) is fraught with practical difficulties and will impair the Congressionally-intended assurance that a financially sound source of the required payments will be available. On the contrary, Pennsylvania National's position - even if confined to the particular combination of circumstances present in this case (a limitation which could not reasonably be imposed if Pennsylvania National's rule were accepted) - would leave no financially responsible party to pay the benefits in many cases.

A company does not need any particular financial status in order to engage in a business, and carry on employment, which is subject to the Longshoremen's Act. Anyone may do so; a stevedoring or shipbuilding or repair company, for example, may be formed in order to perform a single short-term contract for a shipowner. The Act does require, however, that the company, regardless of its own financial soundness, carry insurance with a recognized insurance company, authorized

by the Secretary of Labor to write Longshoremen's Act insurance. See Longshoremen's Act 33 U.S.C. Section 932 (a) (1).[1] It would be atypical in the extreme that an authorized Longshoremen's Act insurance carrier would have less financial stability, long-term or short-term, than its insured employer.

Maritime employers go out of business all the time. They may do so without interference from the Office of Workers' Compensation Programs, so long as they carried Longshoremen's Act insurance while they did carry on employment. It is only the conduct of business - more properly, of *employment* - that requires insurance or other concern for legal obligations under the Act; for it is only the conduct of employment that can give rise to liability under the Act. Regardless of when that liability may arise, or a cause of action may accrue or mature, it attaches to the employer because of its conduct of employment in a maritime operation.

Pennsylvania National's suggestion that the obligation to pay unrelated-death benefits should be placed on the employer's insurer at the time of the death would leave no party with liability in those cases where the employer is no longer in business. It would leave liability solely on the employer where the employer is no longer in any business covered by the Longshoremen's Act.

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[1] Section 2 of 33 U.S.C. 932 (a) provides in the alternative that the Secretary may authorize a company to "self-insure" by posting a bond or collateral to assure its performance of its obligations as they arise. In practical terms this alternative is only available to particularly sound and established employers, and bonds or collateral are retained in substantial amounts.

Insurance carriers, on the contrary, may not come into and go out of business at will. Financial stability is the very essence of the extreme regulation under which they operate. Its position, therefore, on this issue is simply not realistic or sustainable.

CONCLUSION

For the aforegoing reasons and further that the case does not present a constitutional question of Federal law which has not been or should be settled by this Court nor is there a Federal question in conflict with applicable decisions of this Court or any of the Circuit Courts and, therefore, the Writ of Certiorari should be denied.

Respectfully submitted,

SAMUEL KIMMEL
A. OWEN HENNEGAN
Moore, Hennegan, Carney & Ryan
406 Jefferson Building
Towson, Maryland 21204
828-7100

Attorney for Respondents